INDEX

	Page
INTRODUCTION	2-5
QUESTIONS PRESENTED	6
STATEMENT OF THE CASE	6-8
CONCLUSION	9

CITATIONS

Case	Page
In re United States, 207 F.2d 567 (CA 5, 1953)	7
Kirkland v. Protective Committee, 402 US 907 (1971)	3
Protective Committee v. Anderson, 390 US 414 (1968)	2
Protective Committee v. Kirkland, 434 F.2d 804, reh. en banc den. at 808 (1970)	2
Protective Committee v. Mehrtens, 457 F.2d 104 (1972), reh. en banc den. at 106 (1972)	4
Protective Committee v. Wolff, 457 F.2d 100, reh. en banc den. at 103 (1972)	4

RULES

Supreme Court Rule 23(5)	7
Federal Rules of Appellate Procedure Rule 21	7

MISCELLANEOUS

9 *Moore Federal Practice*, 3402-3403	7

in the
Supreme Court
of the
United States

OCTOBER TERM 1971

NO. 71-1610

HONORABLE WILLIAM O. MEHRTENS, Judge,
United States District Court for the
Southern District of Florida,
Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT
STOCKHOLDERS OF TMT TRAILER
FERRY, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

This brief is on behalf of respondent Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. ("committee"), and individual respondents Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason ("committee counsel"), in opposition to the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit, filed June 9, 1972 on behalf of the Hon. William O. Mehrtens, Judge of the United States District Court for the Southern District of Florida.

On the only occasion when this Court accepted certiorari in this now 15-year-old Ch. X reorganization, it reversed confirmation of the third of a series of reorganization plans that had excluded stockholders from participation, and remanded. *Protective Committee v. Anderson*, 390 US 414 (1968).* On the latest attempt at certiorari before the instant petition, this Court in 1971 denied trustee's counsel's attempt to get review of a 1970 order of the same court of appeals that had (a) increased from $10,000 fee allowance and $5,000 expense reimbursement allowance to $60,000 and $10,000 an interim award made by the presently petitioning district judge to committee counsel on account of those ultimately successful services in opposing the bad plans; (b) reversed the same district judge's refusal of instructions to trustee's counsel to quit harassing committee members and committee counsel; (3) reversed his refusal of a protective order against proposed depositions to inquire into a swarm of allegations of disqualification of committee counsel, that were a phase of that harassment. ***Protective Committee v. Kirkland*** **(A 2), 434**

*For a review of the many earlier appellate proceedings, ibid, at 416 n.

F.2d 804, reh. en banc den. at 808 (1970). This Court rejected certiorari. *Kirkland v. Protective Committee*, 402 US 907 (1971).

The current petition now seeks review of two same-day 1972 decisions of the court of appeals:—

One was an original all writs proceeding there, in which the committee and its counsel sought from the court of appeals and obtained mandamus and prohibition to require him to comply with that earlier 1970 decision of the court of appeals. The committee and its counsel alleged (A 88, at 91-93) and the court of appeals found (A 263 ff) that the district judge's order on the mandate from that 1970 decision (A 80, at 84-85 ¶¶3, 4 and 86-87 ¶8) had imposed new and unwarranted limitations on the court of appeals' award of increased interim fee and reimbursements to committee counsel, and that his order had further flouted the mandate of that prior decision by authorizing the reorganization trustee's counsel to conduct discovery looking to "retry" (A 264) the alleged disqualification of committee counsel that the court of appeals had already ruled out in its prior decision.

The court of appeals concluded its opinion:

"It is a matter of chagrin to us that more than a year after our final decision in this case our mandate continues to be frustrated. Such a state of affairs cannot be permitted. We, therefore, order that the District Court immediately rescind its order on the mandate, that it forthwith carry into effect the provisions of our original mandate, that it order the payment of the fees and ex-

penses to Committee counsel set forth in our decision without the restrictions imposed by the District Court, and finally, that the District Court cancel the general discovery proceedings relating to disqualification of the Committee's counsel which it has authorized", *Protective Committee v. Mehrtens* (A 263 at 265), 457 F.2d 104, reh. en banc den. (A 266), 457 F.2d 106, (1972).

The other decision that the petitioner district judge now seeks to have reviewed is one to which he was not even a party. On the same day as its all writs decision the court of appeals struck down as exorbitant an $89,020 interim fee that he had awarded to trustee's counsel for 1970 services, reducing it to $30,000. The court of appeals noted a prior unappealed $60,583 award for 1969 services it also deemed exorbitant, a total of $149,603 fee for less than full-time service over the two-year period. Since from a quarter to a third of trustee's counsel's time for that period had been occupied in harassing the stockholders protective committee and its counsel while accomplishing very little in winding up the reorganization, the court of appeals further directed the judge to put a $30,000 per year ceiling on any future interim fees awarded to trustee's counsel, final fees to await conclusion of the reorganization (A 267, at 270-271). *Protective Committee v. Wolff* (A 267), 457 F.2d 100, reh. en banc den., ibid 103 (1972).

The court of appeals made plain that the purpose of this direction was to prod the judge into making trustee's counsel get off committee counsel's back and get on with the reorganization:

"When the United States Supreme Court reversed this Court in May 1968 in Protective Committee v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, it remanded the matter for further proceedings. The Supreme Court disapproved the plan of reorganization, giving in detail its reasons therefor, and stated a number of things which had to be done to complete the reorganization. It will soon be four years since the Supreme Court decision was handed down, but as the representatives of the Securities and Exchange Commission have pointed out to us, both in brief and in oral argument, very little has been accomplished toward the consummation of that result. It has been necessary that this panel, which now has the assignment of this case to its conclusion, hear oral argument on two special occasions to attempt to settle the intramural squabbling and fighting which has been going on between counsel. We cannot allow our resources to be extended in such a wasteful and unprofitable manner. In our prior opinion we pointed out 'the absolute need of cooperation and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this re-organization'. 434 F.2d at 807. It is apparent that to this point no attention has been paid to our salutary injunction" (A 269-270).

QUESTIONS PRESENTED

We restate the questions:

A. *The All Writs Proceeding:*

May the court of appeals issue mandamus and prohibition to make the district court obey its earlier mandate?

B. *The Fee Appeal:*

Does the district judge have standing to seek certiorari from a decision on appeal reversing an excessive interim fee award made by him to a Ch. X reorganization trustee's counsel, and setting an annual ceiling on future interim awards to such counsel?

STATEMENT OF THE CASE

In the Introduction portion of this brief, supra p. 2-5, we have restated petitioner's presentation of the prior proceedings in this Court and in the courts below, that generated the questions now presented.

ARGUMENT

A. *The All Writs Proceeding:* — Here the only issue is whether the court of appeals may properly direct a district court to obey its mandate in an earlier appeal. Obviously yes. The district judge's petition suggests, although vaguely, that all writs procedure did not lie, and that we should have appealed his order on the remand if

we did not like it (Pet. 2-3, 9-10). But of what use is appeal upon appeal when a district court will not obey an appellate mandate? We pointed out in the all writs petition that stronger medicine was needed (A 110); and the court of appeals administered it. Such direct protection of the appellate power is a central application of these extraordinary writs. *In re United States*, 207 F.2d 567 (CA 5, 1953); 9 *Moore Federal Practice*, 3402-3403. By contrast to the slow waltz of an appeal, the provision for simplified proceedings and the requirement of "preference over ordinary civil cases" for mandamus and prohibition cases, set out in FRAP Rule 21, effects fast and specific correction in the situation where the lower court "misconstrued and misapplied our mandate" (A 264).

B. *The Fee Appeal:* — The petition specifically seeks review not only of the all writs decision of the court of appeals but of its separate decision putting an annual $30,000 ceiling on future interim fees to trustee's counsel, for it addresses itself to "two" decisions of the court of appeals (Pet. 2) citing the fee decision (A 267) as one of them. This attempt by the petition to seek review in the name of the district judge, addressed to an appellate decision to which he was not a party appellant or appellee but merely the judge it reversed, is sought to be rested (Pet. 2) on this Court's Rule 23(5). That rule provides:

> "Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions it shall suffice to file a single petition for writ of certiorari covering all the cases".

Nothing in this language authorizing a composite petition authorizes a party in one of two related cases to bring on the other case without joinder by the losing party or parties to the other case. Omitted parties, here fee claimants, are not to have a free ride on the all writs case. This is both for the reason that if this were permitted they could not be cast in costs since they are not named parties, and for the more basic reason in this case that fee squabbles are ordinarily not worth the attention of this Court. But assuming that any phase of the court of appeals decision in the fee appeal is properly before this Court, there is no occasion for this Court to review either that or the all writs decision unless this Court should wish to reaffirm the supervisory power of the court of appeals.

CONCLUSION

One aspect of the harassment that led the court of appeals to both decisions complained of in the petition is that committee counsel still do not dare to spend the district court's niggardly 1969 award or the court of appeals' more generous 1970 award they earned in activity before mid-1968, four years ago. They placed this money in segregated savings-and-loan accounts pending resolution of this constantly looming threat of further proceedings to disqualify committee counsel and to recoup payments to them (A 94). The petition, filed on the 90th day after the court of appeals summarily denied the rehearings en banc, and on the 154th day after entry of the court of appeals decisions sought to be reviewed, affords delay and further obstruction to compliance with the lawful orders of the court of appeals. This Court should plainly not have been burdened by it.

Respectfully submitted,

IRWIN L. LANGBEIN
604 Comeau Building
West Palm Beach, Florida 33401

IRMA S. MASON
4740 Connecticut Avenue, N.W.
Washington, D.C. 20008

Counsel for respondent Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. and for individual respondents
Malcolm S. Mason, Irma S. Mason, Irwin L. Langbein

By /s/ Irwin L. Langbein
Of Counsel